No. 15,391

In the

United States Court of Appeals

For the Ninth Circuit

BENJAMIN B. HOFFMAN,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

Appellant's Reply Brief

Appeal from the United States District Court
District of Arizona

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SUBJECT INDEX

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We have examined Appellee's brief and on account of the time element and the lack of necessity of answering some of the argument put forth by Appellee, we are going to touch only on Appellee's argument in opposition to Appellant's Specification of Errors numbered 2 and 3, and Specification of Error Number 4.

On the sufficiency of the Indictment we will say only that the Appellee is mistaken when he says (page 9 Appellee's brief) that the Indictment is cured by a Bill of Particulars. A Bill of Particulars should be disregarded in passing on the sufficiency of an Indictment (*United States v. Comyns, et al,* 248 U.S. 349, 39 S.Ct. 98 at 99).

ANSWER TO APPELLEE'S ARGUMENT RE SPECIFICATION OF ERRORS NUMBERED 2 AND 3

(Pages 21-40 inclusive Appellant's Opening Brief;
Pages 12-21 inclusive Appellee's Brief)

In connection with the above numbered Specification of Errors, we are satisfied with the presentation made in our opening brief, but in view of the theory of the Appellee that "we have substantially proven the false pretenses and representations of the defendants and the Transcript of Record bears this out", we thought it might be well to reply to this contention. We know that it is not necessary to prove each, every and all of the false pretenses and representations charged in the Indictment, but certainly it is necessary that enough of them be proved so that it can be said that the scheme is substantially proven as laid. (*Rude v. United States, infra*). As was said in *Shaddy v. United States* (8 Cir.) 30 F.2d 340, which was a case in which the defendant's admissions bore closely on a concession of guilt:

> "* * * A purchase of goods with the intention not to pay for them would be a fraudulent scheme. (Citing cases). But in this case, it was not even material whether the goods were so purchased; the essential intent being to obtain them on false representations. The indictment charged a different scheme and complete offense under the terms of the statute. (Citing cases).
>
> * * * The main question for the jury was whether this defendant made the alleged representations with a fraudulent intent in fact. The Government had the burden of proof. But by the language of the court the necessary intent was attributable to him from the result of his acts as a presumption of law, which, assuming it to be disputable, cast upon him the burden of disproving such intent. * * *"

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1. Figures in parentheses refer to pages in printed Transcript of Record.

In the case now before this Honorable Court for decision, it is to be noted that the scheme itself was the obtaining of money and property "by means of false and fraudulent pretenses, representations and promises" (3, 4).[1] We are sure that the allegations with reference to false and fraudulent pretenses, representations and promises cannot be considered a surplusage, because the alleged false and fraudulent pretenses, representations and promises by the allegations of the Indictment in and of themselves constitute the scheme to defraud. We earnestly insist that, assuming the Indictment is valid, the Government has failed to prove its case as to each and every Count of the Indictment, whether it be Counts under the wire fraud or the mail fraud statute.

We are not dealing here with constructive fraud. We have a charge of actual or active fraud, alleged to have been perpetrated by the defendant on the persons named, not in the scheme, but named only in the *gist of the offenses charged* after the scheme is alleged, and incorporated by reference, in each and every Count of the Indictment upon which defendant was convicted. As stated in *Epstein v. United States* (6 Cir.) 174 F.2d 754, 763:

> "* * * A defendant in a criminal case is entitled to know what he is charged with; *and he is entitled to be tried on the charges brought against him.* (Citing cases). (Emphasis supplied.)

The charges of making false and fraudulent pretenses, representations and promises as laid in the Indictment were not substantially proven, in fact, we take the liberty of saying such charges were not proven at all.

McLendon v. United States (6 Cir.), 2 F.2d 660;
Weber v. United States (10 Cir.), 80 F.2d 687, 691, 692;

Rude v. United States (10 Cir.), 74 F.2d 673, 677;
Mitchell, et al v. United States, (10 Cir), 118 F.2d 653, 655.

In the *Epstein* case, *supra,* it is said (174 F.2d at page 766):

> "In order to prove a scheme to defraud under the mail fraud statute, there must be proof of a scheme embracing active or actual fraud. A charge of using the mails to carry out a scheme to defraud cannot be maintained on proof of mere constructive fraud. * * *."
> "Assuredly, we must consider fraud in mail fraud cases according to the standard of what fraud is in civil cases. That, however, is no qualification of the rule that to sustain a charge of using the mails to defraud, there must be proof of an actual fraud, rather than a constructive fraud; and the fact that the crime of using the mails to defraud is not limited to what would give rise to a common-law action for deceit means, for instance, that a showing of loss to the victim is not necessary to conviction for mail fraud; it does not imply that constructive fraud, or anything less than actual fraud, can sustain the charge of using the mails to defraud."

When the pretenses or representations or promises which execute the deception are fraudulent and false, they become the scheme or artifice which the statute denounces. *United States v. New South Farm and Home Company et al,* 241 U.S. 64, 36 S.Ct. 505, 508.

In *Rude v. United States, supra,* the Court said (74 F.2d at 677):

> "It is not necessary to prove all the false representations alleged in an indictment based on Section 215, supra, but it is necessary to prove those essential to lay a sufficient foundation for a finding by a jury that

> a scheme in substance was devised. (Citing cases). Many of the representations were proved to be false, but the evidence was insufficient to lay a foundation for the jury to find defendants devised a scheme * * *."

The Appellee, "in order to conserve time and space, * * * has selected Count XI to make a detailed statement of fact." (See pages 3 and 4 of Appellee's Brief.) There is nothing in the testimony of Mr. Brice in support of Count XI[2] that would indicate that a substantial part of, or any, false and fraudulent pretenses, representations and promises charged in the Indictment were made to Mr. Brice by the defendant. We note particularly on page 4 of Appellee's Brief that the defendant represented to Brice "in a later telephone call, prior to shipment by Mr. Brice, when defendant represented that he was the one purchasing the James A. Dick Grocery Company, Tucson, Arizona, when such was not the fact." This event is not even charged in the Indictment. As is pointed out in *Mitchell, et al v. United States, supra,* where a particular event is not charged in an indictment it cannot be used as a basis for conviction. 118 F.2d at page 655).

The Appellee, in its brief on page 6 states:

> "The jury found that this maneuvering by the defendant constituted 'lulling' procedures designed to keep Brice from understanding the true situation regarding his account, his merchandise, and the scheme of the defendant to which he had become a victim."

Brice, in his testimony, stated definitely that the $400.00 payment he received made him come out about even on the deal, *and that there was no other merchandise ordered after that payment and none shipped* (133, 134). This was not a "lulling" transaction, as the scheme, if any there was, was

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2. Apparently was selected by the United States Attorney as being the best Count in the Indictment.

fully consummated as to Brice when the defendant received the pickles (118 F.2d at page 655).

We sincerely insist that when specific representations, pretenses and promises are charged that they must be proven substantially as laid. The James A. Dick Grocery Company ownership matter is not even charged in the Indictment, and can in no way aid the proof as to any Count in the Indictment, including Count XI, which is the only Count in which the use of the interstate wire coincides with the date of the scheme. However, the proof, with reference to the date of the use of the interstate wire, does not in any way coincide with the date laid in Count XI (Appellant's Opening Brief pages 32 to 36).

The "lulling" charged in the Indictment is that the defendant made token payments to induce the sellers thereof to further rely on the false representations and promises previously made (4). The James A. Dick Grocery Company matter not being charged in the Indictment, has nothing to do with making the token payment, and the token payment was stated by Mr. Brice not to have "lulled" him into anything (133, 134).

Whatever may be said with reference to the sufficiency of the Indictment to state an offense against the United States or the other points raised in Appellant's Opening Brief, which, because of shortness of time, will not be further commented upon extensively, we feel definitely sure that the evidence is wholly insufficient to support the scheme, i.e., the alleged false and fraudulent pretenses, representations and promises alleged in Count I, and by reference incorporated in each and every other Count in the Indictment.

This case aparently was tried by the Appellee on the theory that if the defendant ordered the products set forth

in the Indictment, that that constituted a promise and representation that the defendant intended to pay for the products ordered. We are not complaining at this late date with reference to the court's instruction on this point; what we do complain of is the fact that whatever the instructions were, the evidence is wholly insufficient to sustain the verdicts. The instruction set forth beginning at the bottom of page 13 of Appellee's brief (380), and, indeed, the Appellee's own theory is that you must infer (1) that if the defendant ordered the products set forth in the Indictment, that this constituted a promise that defendant intended to pay for same, and (2) another inference based on that inference that the defendant feloniously had no intention of paying for the products ordered. You, of course, cannot build an inference on an inference. Under the evidence, in order to sustain the verdicts, this Court would have to base presumption on presumption, or, in other words, inference on inference.

On pages 12 and 13 of Appellee's Brief, Appellee set forth a list of five so-called "false pretenses or false representations", which it says runs through all Counts of the Indictment. These are not backed up by the record, and if they were so backed up, they do not constitute the false and fraudulent pretenses, representations and promises set forth in the Indictment (4). A casual reading of these alleged false pretenses or false representations will show that they are not either charged in the Indictment, or if charged, there is no evidence to support them. The writer cannot put his finger on any testimony to support the claim that Hoffman said he would make payment on account pursuant to the custom of the trade; he does recall that one of the witnesses testified as to what the custom of the trade was, but not that the defendant discussed any such matter.

We again respectfully submit that the Government has substantially failed to prove the scheme; i.e., false and fraudulent pretenses, representations and promises attempted to be alleged in the Indictment.

We fully realize that this Court will not weigh the evidence, and that if there is any substantial evidence to support any Count in the Indictment, that it will affirm, but we again earnestly insist that for the reasons stated, no County in the Indictment has been proven by substantial evidence.

As stated in the cases, a defendant in a criminal case is entitled to be tried on the charges brought against him, and when the pretenses or representations or promises which execute the deception are fraudulent and false, they become the scheme or artifice which the statute denounces. In this case, such constitutes the scheme. There never has been any claim by us that the defendant did not receive the products ordered, except in one instance where the Appellee showed that a carload of peas was stopped in transit. The fact that the defendant received the goods and did not fully pay for same does not prove that defendant made the false and fraudulent pretenses, representations and promises charged in the Indictment.

In passing, it might be well to call this Honorable Court's attention to the testimony of one John E. Doyle called by Appellee in support of its case. Doyle's testimony is briefly referred to on pages 6 and 12 of Appellee's Brief. It also appears in the printed Transcript of Record on pages 200 to 214 inclusive. Doyle's testimony as a whole is a sample of some of the evidence adduced by Appellee and upon which the defendant was convicted.

Doyle testified that he overheard certain telephone conversations by the defendant with others. He does not name

any of the persons called, and in not one of the conversations is it shown that the defendant made any of the representations, pretenses or promises charged in the Indictment. To say Doyle was mistaken in what he did testify to would be mildly putting it. He testified in substance as follows:

"My name is John E. Doyle and I presently am living at 3525 E. Belleview, Tucson, Arizona. I recognize the name of Ben B. Hoffman and Benjamin B. Hoffman Wholesale Grocers as a broker (200). I see Mr. Hoffman in this court room. He is that baldheaded fellow right back of you, wearing a brown coat. I worked for Mr. Hoffman for a week at between 1602 and 1606 S. 4th Ave., Tucson. At that time I lived right across the street from that address, and lived there for about 3 years. Of my own knowledge Hoffman operated there close to a year (201). The date of the business operated across from me was around in June somewhere in the year 1954. I am sure it was 1954 when I worked for Ben about a week. My working hours were from 8:00 in the morning to 4:00 in the afternoon. During the time I worked for Mr. Hoffman he was at the office in the morning—went home for lunch—came right back and was there most of the day. I observed his business operation (202). He had no files nor books of record in the office, and his only employees were me and him, and his wife came in once in a while (203).

Q. What was the character of Mr. Hoffman's business? What did he do to get business?

A. Well, he would come in in the morning with a list his wife give him. She come down and handed him the list, and he would call up these, the long distance operator, and he would give them a list of people that he wanted to call, give him four, five, six or seven of them. And then she would put in the calls, and they called him, and he would order the stuff, whatever he had on the list.

Q. Now, on these particular calls, were those prepaid (201) calls, or were they collect calls?

A. The other party paid for them.

Q. In other words, it was a collect call?

A. No, it was not collect.

Mr. Whitney: Your Honor, I object. May we ask a question on voir dire?

The Court: You can cross-examine.

Q. (By Mr. Eubank): Now, could you approximate the number of these calls you overheard while you were in the office?

A. Yes, I got a list here. Is it all right to look?

Q. Not right at the moment. I am asking for an approximate number, if you can give one.

A. I don't know how many he had. I got it right down here, sir. That is some of his paper there, too.

Q. On these collect calls they made, were they quite numerous in a day's time?

A. Yes.

Q. Now, you say that you overheard collect calls. Do you recall the character of the conversation?

A. Well, I will just tell you how he used to say it, Mike, and I won't give you the names, and them, because I can't remember the names.

He called and said, 'Hello, is this Mr. Jones?' 'Yes.' 'How are you, this is Ben Hoffman, the broker, in (202) Tucson, Arizona, South 4th Avenue.'

'How is business?' That is the way he started out.

Then he would ask them what the article, the price it was, whatever he wanted, and asked him the size of the cans and all that, then he wanted to know if he could get a truckload, and he would want the truckload. And he said, 'Don't forget to put some samples in for the boys.'

Q. Now, were there any salesmen hired by Mr. Hoffman while you were there?

A. No.

Q. Did you see any salesmen come into the office?

A. No. Nobody come in.

Q. Now, on these phone calls that you say you wrote down a memorandum on.

Mr. Whitney: Did he say he wrote a memorandum, on it?

Mr. Eubank: Yes.

Q. (By Mr. Eubank): Do you have that memorandum with you?

A. Yes.

Q. Can you of your own, of your own independent recollection recall those calls, or do you have to refer to that?

A. I got to refer to this here. That is what I wrote right in his office there, and I kept it. That is the same paper I kept.

Q. That is, referring to this, you can testify as to (203) what his calls were?

A. Sure. Sure. I ain't going to lie against the man. I'm telling the truth.

Mr. Eubank: I ask that this be marked as plaintiff's Exhibit 28 for identification.

The Clerk: Government's Exhibit 28 for identification.

Q. (By Mr. Eubank): I show you Government's Exhibit 28 for identification, and ask you if this is the list you were describing?

A. Yes.

Q. And do you relate this list with any particular day? Any day of your employment?

A. Every day, yes, added to it.

Q. Does this list include all the calls, or just a few calls you overheard?

A. This is the main calls that I remembered.

Mr. Whitney: Your Honor, I ask that this be admitted in evidence not for the purpose of refreshing his recollection, (204) but as the evidence he would give.

The Court: He can use that to refresh his recollection.

Mr. Whitney: For what purpose?

Mr. Eubank: For refreshing his memory.

Mr. Whitney: If he is refreshing memory, then you don't put it in. It is either recorded recollection, or nothing else.

Q. (By Mr. Eubank): Using that list, can you then testify of your own recollection?

A. Yes.

Q. Can you tell us the nature of the telephone calls that were made that you listed there, by Ben Hoffman?

A. *He ordered pickles.*

A. A whole truckload of pickles." (Emphasis supplied.)

At this point we call the Court's attention that one of the items ordered by Hoffman, according to Doyle, was pickles and that the year was 1954, whereas the only pickle deal we have any evidence of is in May, 1953. (See testimony of Brice, printed Transcript of Record, page 124.)

Continuing, Doyle testified that beside ordering pickles he ordered canned peaches, brooms, peas and rice.

There does not happen to be any testimony with reference to rice, peaches or brooms, and the pea deal with R. O. Kelley Company happened in August, 1953. (See testimony of R. O. Kelley printed Transcript of Record page 219.)

Doyle further testified that while he was working for the defendant's establishment, the shipments were not received at the establishment, but were sent down to a Tucson warehouse; that there was a storage facility in conjunction with the office where samples were kept (208).

On cross-examination, Doyle testified that he worked six days for Hoffman (209) and that the list he took down in 1954 and had in his possession was kept by him all of the time (210). He testified that the articles in the list were not

put down on the same day, and some of them were written with a fountain pen and some with pencil, that it was all done in the month of June, 1954 at the time he worked for defendant (211).

"Q. (By Mr. La Prade): Mr. Doyle, do you have any record of the exact day that these phone calls were made you have testified about?

A. No. When I first went to work for him that morning, he started in on that telephone, and he never let up until four o'clock.

Q. When was it you made these notations, right after he made the phone calls, or while he was making them?

A. While he was making the phone calls, I would go back and write it down.

Q. Where? Right in back of the office?

A. Yes, right in back of the office.

Q. Did you listen in on his conversations?

A. Yes.

Q. Could you tell who he was talking to?

A. Well, I didn't put them down, but them were the people he called, that represents that product there.

Q. How does it happen you wrote down these different items of pickles, peaches, rice, percolators, suitcases, and so forth, without writing down where he was talking to? Was there any reason why you put down the items, rather than where he was talking to?

A. Some of them I remember where he called. I remember where it was, like that percolator was Los Angeles Coffee Urn, was the name of the company (212).

Q. Mr. Doyle, do you make it a habit to write down portions of your employers' conversations when you are listening to conversations?

A. Sometimes I do it. Conductors, and so forth, when I am on the road, keep a book. If you are going to be a good railroad man you got to do it.

Q. *Couldn't this possibly be a grocery list of your own, Mr. Doyle?*

A. *Not mine. Maybe the wife's but not mine. I ain't got no grocery list.*

Q. Are you positive about all of your testimony, Mr. Doyle? A. What?

Q. Are you positive about all of the testimony you have given? A. On them there?

Q. There is no question about when it was?

A. No question about it at all.

Mr. LaPrade: That is all.

The Witness: I ain't lying. You think I', a liar?

Mr. Eubank: No further questions." (Emphasis supplied.)

Doyle's testimony we believe to be innocuous in view of the charges made against defendant. It is in about the same category as the testimony of one Brandt given in *Greenbaum v. United States,* 80 F.2d 113, 123 wherein it was said in effect that Brandt's testimony was much shaken in other regards, and that the court cannot hold that a jury would convict on his evidence.

RE SPECIFICATION OF ERROR NO. 4

(Pages 40 and 41 of Appellee's Opening Brief)

The Appellee says that to rely on the statement by the Court that "if they don't prove their case, I will direct the verdict" as a point of error is ludicrous. Says the Appellee in its brief:

> "The statement, as Mr. Whitney knows, was directed at the Appellee, *and means what it says, that if the prosecution fails in its proof, the Court will direct a verdict in favor of Defendant.*
>
> *Any prosecutor that has tried a case before Judge Ling knows full well the meaning of his statement. Many has been the case, with a half proven element that has been terminated by a directed verdict when the Government rested its case.* * * *

> If any prejudice did result to the Defendant from this statement at page 40, *Transcript of Record*, it most certainly would not have affected the next day's proceedings and most certainly would not have affected the entire *Transcript of Record* thereafter." (Emphasis supplied.)

The writer feels confident that under the Government's own statement in this regard, that Specification of Error No. 4 is not only meritorious, but demonstrates that the jury may well have thought, in the posture of this case, that if the Court did not direct a verdict, the defendant must be guilty on all the Counts, at least that was the jury's verdict. The Government fails to cite one single authority that holds that such a statement by the court in the trial of a case is not an error of a prejudicial nature.

CONCLUSION

By this reply brief we are not in any way waiving other errors specified in our opening brief. We are simply attempting to buttress our argument made in the opening brief on the sufficiency of the evidence to sustain the verdicts, and on the Court's improper remark in overruling an objection to evidence made by defendant's counsel.

We again respectfully submit that if it should be held that the indictment in this case is valid, that this Honorable Court reverse with instructions to the Court below to acquit the defendant on each and every Count of the Indictment upon which he was convicted; that in all events this case should be reversed on account of other specified errors.

Respectfully submitted,

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